

AO 241
(Rev. 10/07)PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		Distri
Case: 2:14-cv-14485 Judge: Michelson, Laurie J. MJ: Grand, David R. Filed: 11-21-2014 At 03:08 PM HC MCCRARY V RIVARD (EB)		
Name (under which you were convicted): <u>Darrius Martice McCrary</u>		
Place of Confinement:	Prisoner No.:	
<u>St. Louis Correctional Facility</u>	<u>#827472</u>	
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)	
v.		
<u>Darrius Martice McCrary</u>	<u>Steve Rivard</u>	
The Attorney General of the State of <u>Michigan</u>		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Oakland County Circuit Court
1200 N. Telegraph Rd. Pontiac, MI 48341

(b) Criminal docket or case number (if you know): 2011-237873-FC

2. (a) Date of the judgment of conviction (if you know):
- December 19th, 2011

(b) Date of sentencing: January 17th, 2012

3. Length of sentence:
- See Attached

4. In this case, were you convicted on more than one count or of more than one crime?
- ☒
- Yes
- ☐
- No

5. Identify all crimes of which you were convicted and sentenced in this case:

St. 1: 1st-degree - Premeditated Murder - Life w/o ParoleSt. 2: Felony Firearm - 2ySt. 3: 1st-degree: Felony Murder - Life w/o ParoleSee Attached

6. (a) What was your plea? (Check one)

☒ 1) Not ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

Ct. 1: Natural Life w/o Parole

Ct. 2: Felony Firearm - 2y

Ct. 3: First-degree Felony Murder - Life w/o Parole

Ct. 4: Felony Firearm - 2y

Ct. 7: Home Invasion - 1st Degree 7-20 y

Ct. 8: Felony Firearm - 2y

continued... (Question 5)

Ct. 4: Felony Firearm - 2y

Ct. 7: Home Invasion - 1st degree 7-20 y

Ct. 8: Felony Firearm - 2y

Grounds I: Did the trial court abuse its discretion and/or otherwise commit error by denying Mr. McCrary's request for a jury instruction on voluntary manslaughter, and/or did that denial deprive McCrary of his constitutional rights to present a defense, to a properly instructed jury and/or due process, because the refusal or failure to give that instruction negated or took away his defense case or right to present that defense case regarding the only disputed issue at trial: his intent?

Ground II: Did the trial prosecutor's direct comments on Mr. McCrary's failure to present a defense and/or evidence to counter the government's proofs, particularly as to intent, violate Darius McCrary's fifth and fourteenth amendment (and state constitutional) rights/protections? Did the prosecutor's comment as to the defense failure to counter the government's case/proofs violate Mr. McCrary's fifth/fourteenth amendment protections by directing the jury's attention to defendant/appellant's decision to remain silent, not to take the witness stand or testify (as a witness against himself) and did it shift the burden of the government to prove his guilt beyond a reasonable doubt without his being called upon to respond in any way?

Ground III: Were defendant's constitutional double jeopardy rights/protections violated by the amended judgment which still listed and formally reflected convictions and sentences on two (2) counts of felony firearm in a case involving only one homicide victim and one murder conviction?

AO 241
(Rev. 10/07)

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Not Applicable

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Michigan Court of Appeals

(b) Docket or case number (if you know): 308237

(c) Result: Affirmed in part, vacated in part, and remanded for amendment of the judgment of sentence in accord with this opinion.

(d) Date of result (if you know): June 13th, 2013

(e) Citation to the case (if you know): People v. McCrory, unpublished per curiam of the Court of Appeals, entered June 13th, 2013 (Docket No. 308237)

(f) Grounds raised: See Attached

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: Michigan Supreme Court

(2) Docket or case number (if you know): 147473

(3) Result: Denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Ground I:

The court committed error in this case by refusing to instruct the jury as requested on voluntary manslaughter. Such a ruling and refusal to so instruct the jury denied Darius McCary his state and federal constitutional rights to fundamental due process, a fair trial, to trial by jury / to properly instructed jury and the right to present a defense because it negated his theory of the case regarding the real, if not only dispute issue at trial: His intent. The result here was a miscarriage of justice mandating reversal and a new trial.

Ground II:

The trial prosecutor's direct comments on defendant's failure to present a defense and/or defense evidence to counter the government's proofs, particularly as to intent mandates reversal of his convictions. Such comments are prohibited by the fifth and fourteenth amendments to the federal constitution, Michigan's constitution Consti, 1963, Art I Sec. 17 and statute. (MCL 600.2159)

Ground III:

Defendant's rights against double jeopardy under both state and federal Constitution's were violated because the judgment of sentence contains two (2) counts of murder (1st degree premeditated and 1st degree Felony Murder) and two (2) companion counts of felony firearm in a case involving only one (1) homicide victim. Both the federal and state constitutions prohibit multiple convictions and punishment for the same offense. Const. Amend V. 1963 Art I. Sec. 15

AO 241
(Rev. 10/07)

(4) Date of result (if you know):

November 25th, 2013

(5) Citation to the case (if you know):

People v. McCrory, order of the Supreme Court, issued November 25th, 2013 (Docket No. 147473)

(6) Grounds raised:

See Attached

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes

☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

Oakland County Circuit Court

(2) Docket or case number (if you know):

2011-237893 - FC

(3) Date of filing (if you know):

October 22nd, 2014

(4) Nature of the proceeding:

Motion for relief from judgment under MCR 6.500

(5) Grounds raised:

Defendant was denied due process of law and a fair trial by the colored photos calculated to appeal to sympathy and excited passion or prejudice of the jury.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes

☒ No

(7) Result:

AO 241
(Rev. 10/07)

✓(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: Not Applicable

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Not Applicable

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

AO 241
(Rev. 10/07)

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result: _____

(8) Date of result (if you know): _____

✓(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☐ Yes ☒ No

(2) Second petition: ☐ Yes ☒ No

(3) Third petition: ☐ Yes ☒ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Mr. McCreary was denied his right to present a defense case or defense theory for jury consideration.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. McCreary hereby incorporates within and adopts by reference his appellate brief on appeal filed in the Michigan Court of Appeals on December 6, 2012 regarding argument I and realleges same as though fully stated herein.

(b) If you did not exhaust your state remedies on Ground One, explain why: All available state remedies for this ground have been exhausted.

AO 241
(Rev. 10/07)

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state: Not Applicable

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

AO 241
(Rev. 10/07)

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: None

GROUND TWO:

Mr. McCrary was denied his right to have the government prove his guilt beyond a reasonable doubt without him being called upon to defend or respond in any way.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. McCrary hereby incorporates within and adopts by reference his appellate brief on appeal ~~dated~~ filed in the Michigan Court of Appeals on December 6, 2012 regarding argument "II" and realleges same as though fully stated herein.

(b) If you did not exhaust your state remedies on Ground Two, explain why: All available state remedies for this ground have been exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

AO 241
(Rev. 10/07)

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

☐ Yes

☒ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes

☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes

☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two None

GROUND THREE:

Mr. McCrary was denied his right not to be convicted and sentenced twice for one (1) crime.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. McCrary hereby incorporates within and adopts by reference his appellate brief on appeal filed in the Michigan Court of Appeals on December 6, 2012 regarding argument "III" and realleges same as though fully stated herein.

AO 241
(Rev. 10/07)

(b) If you did not exhaust your state remedies on Ground Three, explain why: All available state remedies for this ground have been exhausted

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: Not Applicable

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

AO 241
(Rev. 10/07)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: None

GROUND FOUR: Mr. McCrory was denied his right to have due process of law when the prosecutor showed inflammatory ~~the~~ colored photographs to the jury.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. McCrory hereby incorporates within and adopts by reference his pro se motion for relief from judgment under MCR 6.500 filed in the Oakland County Circuit Court on October 22nd, 2014 regarding issue, and realleges same as though fully stated herein.

(b) If you did not exhaust your state remedies on Ground Four, explain why: cannot answer yet still exhausting.

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

ineffective assistance of appellate counsel.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?



Yes



No

(2) If your answer to Question (d)(1) is "Yes," state:

AO 241
(Rev. 10/07)

Type of motion or petition: Motion for relief from judgment under MCR. 4.507
Name and location of the court where the motion or petition was filed: Oakland County Circuit Court,
Pontiac, MI
Docket or case number (if you know): 2011-237893 - FC
Date of the court's decision: cannot answer yet - still pending
Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: None

AO 241
(Rev. 10/07)

13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: Cannot answer yet

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. Not Applicable

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. Cannot answer yet

AO 241
(Rev. 10/07)

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Steven P. Lynch

(b) At arraignment and plea: Steven P. Lynch

(c) At trial: Steven P. Lynch

(d) At sentencing: Steven P. Lynch

(e) On appeal: John D. Lazar

(f) In any post-conviction proceeding: In pro per

(g) On appeal from any ruling against you in a post-conviction proceeding: In Pro Per

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

AO 241
(Rev. 10/07)

Therefore, petitioner asks that the Court grant the following relief:

For ground one (1), Mr. McCrary asks
this court to issue a writ of habeas corpus conditioned on the state of Michigan granting
him a new trial with the stipulation that the jury be given the manslaughter instructions. (See Below)
or any other relief to which petitioner may be entitled.

Not Applicable

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for

Writ of Habeas Corpus was placed in the prison mailing system on November 17th, 2014 (month, date, year).

Executed (signed) on 11-17-14 (date).

James McCrary

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

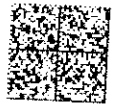
Relief Continued... For ground two (2), Mr. McCrary asks this court to issue a writ of habeas corpus conditioned on the State of Michigan granting him a new trial with the stipulation that the prosecutor not commit any acts of misconduct.

For ground three (3), Mr. McCrary ask this court to issue a writ of habeas corpus conditioned on the state of Michigan correcting the judgment of sentence to reflect one count of first-degree murder based on two (2) theories - premeditated and felony murder - and to reflect one sentence for the first-degree murder conviction.

For Ground four (4), Mr. McCrary ask this court to issue a writ of habeas corpus conditioned on the State of Michigan granting him a new trial with the stipulation that the inflammatory colored photographs be excluded.

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CIVIL COVER SHEET FOR PRISONER CASES

Case No. <u>14-14485</u>		Judge: <u>Laurie J. Michelson</u>	Magistrate Judge: <u>David R. Grand</u>
Name of 1st Listed Plaintiff/Petitioner: DARRIUS MCCRARY		Name of 1st Listed Defendant/Respondent: STEVE RIVARD	
Inmate Number: <u>827472</u>		Additional Information:	
Plaintiff/Petitioner's Attorney and Address Information:			
Correctional Facility: St. Louis Correctional Facility 8585 N. Croswell Road St. Louis, MI 48880 GRATIOT COUNTY			

BASIS OF JURISDICTION

- ☐ 2 U.S. Government Defendant
☒ 3 Federal Question

ORIGIN

- ☒ 1 Original Proceeding
☐ 5 Transferred from Another District Court
☐ Other:

NATURE OF SUIT

- ☒ 530 Habeas Corpus
☐ 540 Mandamus
☐ 550 Civil Rights
☐ 555 Prison Conditions

FEE STATUS

- ☒ IFP *In Forma Pauperis*
☐ PD Paid

PURSUANT TO LOCAL RULE 83.11**1. Is this a case that has been previously dismissed?**

- ☐ Yes ☒ No

➤ If yes, give the following information:

Court: _____

Case No: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

- ☐ Yes ☒ No

➤ If yes, give the following information:

Court: _____

Case No: _____

Judge: _____